SUPREME COURT, U. S.

No. 865

FILED

NOV 30 1967

JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

October Term, 1967

E. W. BUSCHMAN CO.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

E. W. Buschman Co. (hereinafter called "Petitioner") prays that a writ of certiorari issue to review the judgment and decree of the United States Court of Appeals for the Sixth Circuit enforcing an order of the National Labor Relations Board against the Petitioner.

OPINIONS BELOW

The decision and order of the National Labor Relations Board entered June 28, 1965 is reported at 153 NLRB No. 65. The opinion of the United States Court of Appeals for the Sixth Circuit entered July 20, 1967 is reported at 380 Fed.2d 255.

JURISDICTION

The judgment and decree of the United States Court of Appeals for the Sixth Circuit was entered on July 20, 1967, and the Petitioner's motion for a rehearing was denied on September 5, 1967. The jurisdiction of this Court is invoked under 62 *Stat.* 928 (28 U.S.C. Sec. 1254 (1)) and 61 *Stat.* 136 (29 U.S.C. Sec. 160 (e)).

QUESTION PRESENTED

Whether Petitioner has a duty to rehire three employees, who the NLRB found were discharged for circulating a petition on company premises in violation of Sec. 8 (a) (1) of the Act, where the collective bargaining agreement prohibited such solicitation and circulation, and thereby waived whatever rights these employees had to engage in such conduct.

FEDERAL STATUTES INVOLVED

The primary statutory provisions involved are Sections 7, and 8 (a) (1) of the National Labor Relations Act (hereinafter called the "Act"), 61 *Stat.* 136, (29 U.S.C. Sections 157, and 158 (a) (1)). All pertinent parts appear in Appendix B *infra* pp. 17 to 19.

STATEMENT

In July, 1963, the petitioner and the duly certified local bargaining union (hereinafter referred to as the "Local") were involved in negotiations for a new contract to succeed the one that was to expire on July 23, 1963 (J.A. 6a, 76a, 127a). The petitioner submitted a proposal to Pat Williams, a representative of the International Union. That evening the Local held a meeting presided over by Williams. The members of the Local rejected the offer. Three

employees involved in this case, Bole, Feltner and Clouse — who were also stewards — advocated a strike vote. Williams strongly opposed any such endeavor and terminated the meeting before a vote was taken.

The three stewards then prepared a petition to prohibit Williams from being present at any future contract negotiations between the petitioner and the Local. One of the three was involved in signing this during working time. The petition was made available during working time for signing and was circulated exclusively on the premises of the petitioner.

Later that morning, the three stewards were discharged. An unfair labor practice charge was filed against petitioner because of (1) the discharge of the three employees and (2) the existence of a no solicitation rule, Shop Rule No. 18. Said rule had come into existence with the approval of the Local. That rule read:

> "12. Shop Conduct:
> "Conduct of a nature listed below is not permitted, and if indulged in, is considered cause for suspension or discharge: * * * 18. Soliciting or collecting contributions for any purpose whatsoever on our Company premises without the prior approval of management."

The trial examiner found that shop rule 18 prohibited all solicitation for any purpose in petitioner's plant. He concluded the rule thereby interfered with Section 7 rights, resulting in an 8(a) (1) violation (J.A. 12a). Next, the trial examiner disbelieved the grounds for discharge claimed by the petitioner.[1] He found that the employees

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[1] The petitioner claimed that the grounds for discharge were the creation of disunity among employees, failure to remain at their work stations during working hours, insubordination to supervisors, failure to do work properly, and an attempt to persuade others not to work overtime (J.A. 9a-10a).

were discharged because of the preparation and circulation of the petition. The NLRB affirmed the trial examiner.

The Sixth Circuit reversed the trial examiner's finding that shop rule No. 18 was invalid, because it had been enacted with the approval of the union and under a provision of the collective bargaining agreement. This was based on prior precedents of the Sixth Circuit and Seventh Circuit[2] which the NLRB has refused to follow.[3] The Sixth Circuit quoted from one of its prior cases the following:

> *"Whatever right employees had under Section 7* to distribute Union literature on Company property *may be waived* by their collective bargaining representative. The contractual *waiver of rights* of equal or greater significance has been upheld." (emphasis added) (Appendix A *infra* page 11)

On the other hand, it affirmed the Board's finding that the discharge of the three employees was a violation of Section 8 (a) (1) of the Act, because they had been fired for preparing, signing and circulating the petition. This, said the Sixth Circuit was an interference with their Section 7 rights.

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[2] *NLRB* v. *Gale Products*, 337 F.2d 390 (CA 7, 1964); *General Motors* v. *NLRB*, 345 F.2d 516 (CA 6, 1955); *Armco Steel Corporation* v. *NLRB*, 344 F.2d 621 (CA 6, 1965).

[3] *Mid-States Metal Products*, 156 NLRB No. 90, 1966, L. C. par. 20,165; *General Motors*, 158 NLRB No. 149, 1966 L. C. par. 20,917.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Sixth Circuit (1) decided a federal question in a way that is in conflict with the rationale of the applicable decisions of the Supreme Court and (2) has decided an important question of federal law which has not been, but should be settled, by the Supreme Court.

The Supreme Court has stated that a collective bargaining agreement is the rule of government, or the "constitution" controlling the quasi-governmental relationship between employer, employee and the union in the plant. As was stated in *United Steel Workers* v. *Warrior and Gulf Refining Company,* 363 U.S. 574, 578-9-80 (1960):

> "The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate. * * * The collective agreement covers the whole employment relationship. It calls into being a new common law — the common law of a particular industry or of a particular plant. * * * A collective bargaining agreement is an effort to erect a system of industrial self-government."

When a no solicitation rule on company premises is enacted by agreement between the duly authorized bargaining agent of the employees and the employer, it means that whatever Section 7 rights the employees may have had to circulate a petition *on company premises* are no longer in existence. As the quote from the Sixth Circuit above states, these rights of the employees have been waived by their collective bargaining representative. This is the same position that the Seventh Circuit took in *NLRB* v. *Gale Products, supra,* and that the NLRB originally took as

well. The Seventh Circuit quoted in that case with favor the language from *May Department Stores Co.*, 59 NLRB 976, 981, n. 17, which stated (337 F.2d at 391-2):

> "We do find . . . that the employees embraced by these contracts, on the assumption that the latter were entered into by organizations which represented a majority of the employees in an appropriate unit, have thereby effectively bargained away their right to engage in union solicitation on the respondent's premises. Consequently, and so long as the contractual provisions in question remain in effect, the respondent's prohibition against union solicitation on the respondent's premises at all times by employees covered by such contracts is not to be deemed improper."

The combined effect of the Supreme Court's description of collective bargaining agreement in *United Steel Workers* v. *Warrior and Gulf Refining Company, supra,* and the Sixth Circuit's position is that the "system of industrial self-government" established at petitioner's plant was that there was no Section 7 right to circulate a petition. This waiver of Section 7 rights for the three discharged employees occurred when the collective bargaining agreement was entered into three years prior to the discharge.

The trial examiner rejected the motivation for discharge stated by petitioner. He saddled the petitioner with the motive that "the real reason for the (petitioner's) discharging the three stewards was their known participation in the preparation and presentation of the ouster petition to the other employees" (J.A. 43a). Because of their position that the shop rule was invalid, the trial examiner and the Board could then with consistency find that discharges so motivated were violations of the Act. But the Sixth Circuit's position — (a) the shop rule is valid, (b) it constituted a waiver of the employee's Section 7 rights to

circulate a petition and (c) discharges for circulating a petition are a violation of Section 7 rights — is illogical.

The Sixth Circuit, and the Board in their briefs, have argued that petitioner did not assert that these employees were discharged for violation of the shop rule at the time of discharge. That is irrelevant.

> "Management can discharge for good cause, or bad cause or no cause at all. It has, as the matter of its own business affairs, kept freedom with but one specific definite qualification: It may not discharge when the real motivating purpose is to do that which Section 8 (a) (3) forbids." *Schwob Manufacturing Company* v. *NLRB*, 297 F.2d 864, 870 (CA 5, 1962).[4]

Thus the power of management to discharge with or without cause is limited solely by the requisite that it must not interfere with the rights protected by the Act. Petitioner does not have to assert or prove any cause or shop rule. The General Counsel has the burden of proving a violation of the statute.[5] The motivation for discharge that the General Counsel proved — circulation of the petition — was not in violation of the statute because of the waiver of Section 7 rights on company premises. Further that motive *was* ground for discharge under the express provisions of the Shop Rule![6] The petitioner is being required to take back employees because it interfered with Section 7 rights which they did not have. Section 10 (c) of the Act provides:

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[4] Cited with favor in *NLRB* v. *Murray Ohio Company*, 328 F.2d 509, 514 (CA 6 1964).

[5] *Lawson Milk Company* v. *NLRB*, 317 F.2d 756, 760 (CA 6 1963).

[6] The introduction to the rule states:
"Conduct of a nature listed below is not permitted, and if indulged in, *is considered cause for* suspension or *discharge* . . . ." (emphasis added)

> "No order of the Board shall require the reinstatement of any individual who has been suspended or discharged, * * * if such individual was suspended or discharged for cause."

The effect of the Sixth Circuit's decision is that petitioner is to be punished for interfering with Section 7 rights that are *not* protected by the Act and must rehire the employees and give them thousands of dollars of back wages, even though such *is* prohibited by the Act (Section 10 (c)). At the least, petitioner is entitled to have the decision remanded to the Board for reconsideration of this entire matter in view of the shop rule being a valid limitation on solicitation.

This Court should clarify the federal law as regards the validity of limitations on solicitation rules contained in collective bargaining agreements. Though this court has passed on rules unilaterally imposed by an employer prohibiting solicitation or distribution of literature,[7] it has not passed on the question that is in dispute between the Board, on the one hand, and the Sixth and Seventh Circuits, on the other hand. Hundreds of collective bargaining agreements contain this kind of provision and their validity should be determined. In addition, the *effect* of their existence should be clarified by this Court in order to provide stability in the law.

In addition, the Sixth Circuit's decision on this case is in conflict with a rationale of the applicable decisions of this Honorable Court. This court has many times held that management and the union can enter into agreements significantly limiting what employees can do and what their

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[7] *Republic Aviation Corporation* v. *NLRB*, 324 U.S. 793 (1945); *NLRB* v. *Babcock and Wilcox*, 351 U.S. 105 (1956).

rights are.[8] As we have noted above from our quote from *United Steelworkers* v. *Warrior & Gulf Nav. Co., supra,* the collective bargaining agreement "is an effort to erect a system of industrial self-government." What the Sixth Circuit has done in effect is to state that such a system is valid, but then refused to give it any effect. Where a matter can be negotiated between the union and employer, then the Board, and *a fortori,* a court has no power to nullify that agreement. In this case the union and the petitioner agreed on a shop rule prohibiting solicitation on the company premises and also agreed as to the *effect* of violation thereof, *i.e.,* violations are grounds for discharge.[9]

By refusing to give *effect* to the agreement between the petitioner and the union, which agreement the Sixth Circuit acknowledged was not in violation of the Act, the

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[8] No strike or lockout: *Steelworkers* v. *Warrior & Gulf Nav. Co.,* 363 U.S. 574 (1960); *Mastro Plastics Corp.* v. *NLRB,* 350 U.S. 270 (1956).

Management functions: *NLRB* v. *American Nat'l Ins. Co.,* 343 U.S. 395 (1952).

Ballot and recognition: *NLRB* v. *Borg-Warner Corp.,* 356 U.S. 342 (1957).

Union security: *Radio Officers* v. *NLRB,* 347 U.S. 17 (1954).

Hiring hall: *Teamsters Local 357* v. *NLRB,* 365 U.S. 667 (1961).

Hiring by union foremen: *NLRB* v. *News Syndicate Co.,* 365 U.S. 695 (1961).

Seniority credit for military service: *Ford Motor Co.* v. *Huffman,* 345 U.S. 330 (1953).

Agency shop: *NLRB* v. *General Motors Corp.,* 373 U.S. 734 (1963).

[9] It is of course conceded that the shop rule could not be applied in a discriminatory way. As was stated by this Court in the hiring hall situation, *Teamsters Local 357* v. *NLRB,* 365 U.S. 667, 676-7:

> "(T)he hiring hall, under the laws as it stands, is a matter of negotiation between the parties. The Board has no power to compel, directly or indirectly that the hiring hall be included or excluded in collective agreements * * *. Its power * * * is restricted to the elimination of discrimination."

Of course, discriminatory application of the shop rule is no issue here.

Sixth Circuit has failed to follow the rationale of applicable decisions of this Court. This nullifies the attempt to create a "system of industrial self-government."

CONCLUSION

Petitioner respectfully submits that this Court should decide and clarify the federal laws on the powers of unions and management in collective bargaining agreements to limit Section 7 rights of employees on company premises. This case also should be taken in by this Court because the Sixth Circuit has seen fit to disregard the effect of the agreement between the union and the petitioner on a permissible subject of collective bargaining. This conduct by the Sixth Circuit is in conflict with the rationale of the applicable decisions of this Court. For these reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

No. 17092

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

E. W. BUSCHMAN CO.,
Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board.

OPINION AND JUDGMENT OF COURT OF APPEALS

(Decided July 20, 1967.)

Before: WEICK, Chief Judge, O'SULLIVAN and CELEBREZZE, Circuit Judges.

CELEBREZZE, Circuit Judge. The National Labor Relations Board seeks enforcement of its Order issued on June 28, 1965, against the E. W. Buschman Company (Company). The Board found that the Company violated Section 8(a)(1) of the Act, 29 U.S.C.A., Section 158, by discharging employees Bole, Clouse and Feltner. The Board's decision and order are reported at 153 N.L.R.B., No. 65.

The Company is engaged in the manufacturing and in-

stallation of mechanical and electrical conveyors. Charles Bole, a layout man in the Company's structural steel department, had worked for the Company for eighteen years, and was an assistant shop steward for the Union. Herman Clouse, a layout man in the gravity department, had worked for the Company for twelve years, and was the chief shop steward. Bernard Feltner, a welder in the gravity department, had worked for the Company for twelve years, and was an assistant shop steward. These three stewards also served as the employee representatives on the Union Bargaining Committee.

In July, 1963, the Union[1] and the Company began negotiating for a new contract to succeed the current contract which was to expire on July 23, 1963. Negotiations were held on July 16th, 18th and 23rd. At the bargaining meeting on July 23rd, Patrick Williams, a Union International Representative, joined the Union negotiations, and at this meeting the Company submitted an offer, which if accepted, would have settled the contractual issues which still remained.

On the evening of July 23rd, Williams, the International Representative, presided at a Union meeting where he submitted to the employees the offer proposed by the Company. The employees voted to reject the Company proposal. Feltner then asked for a strike vote. Williams refused to put the strike motion to a vote and adjourned the meeting. After the meeting, Stewards Bole, Clouse and Feltner met with other employees and discussed how they could exclude Williams from further contract negotiations.

The next morning, July 24, 1963, Bole prepared a petition that Williams "not be present at any future meetings

[1] Local 522 of the International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO.

or contract negotiations between the E. W. Buschman Company and Local No. 522." Most of the employees were to begin work at 8:00 a.m. By special arrangement, Clouse began work at 7:00 a.m. At 7:30 a.m., Bole took the petition to Clouse's desk where Clouse signed it as chief steward. Bole and Feltner then signed the petition as assistant stewards and seventeen additional employees signed the petition. Just before 8:00 o'clock, Bole took the petition to his desk and locked it in a drawer. Bole, during his noon hour lunch period, took the petition and placed it on a desk. Company Superintendent John Graziani and Company Attorney Nicholas Bauer saw and read the petition, then took it to Company President, Rudy Vogt. Shortly after noon, Bole, Clause and Feltner were discharged. They were told they were being discharged for creating disunity or dissension among the employees. Two days later, the three discharged men received letters from the Company stating they were discharged for creating disunity among the employees; that they failed to remain at their work stations during working hours; that Clouse failed to do his work properly, and that Feltner refused to work overtime and tried to persuade others not to work overtime.

The Company maintained that the decision to fire the three stewards was made at 10:00 o'clock, before they had seen or read the contents of the petition. However, the record established that the Company was aware prior to 10:00 a.m. on July 24th that the stewards were circulating a petition to oust Representative Williams. The Company also knew the employees had rejected their offer and they were fearful of a strike.

The Trial Examiner found that the stewards were discharged for preparing and signing the petition and procuring the signatures of other employees to the petition. From these facts, the inference was drawn that the Com-

pany discharged the stewards because they opposed the proposed contract. The discharges had the additional effect of dissipating the forces within the Union which could threaten a strike.

There was substantial evidence that the Company knew the petition was being circulated; knew the contents of the petition; knew the underlying reasons for circulating the petition; and knew that the three stewards were the motivating force for rejecting the Company's offer and excluding Williams. The findings of the Board that the discharge of the three Union stewards violated Section 8(a)(1) of the Act is both reasonable and supported by substantial evidence.

Section 7 of the Act provides that employees have the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Interference with such rights, including discharge of employees for exercise thereof, violates Section 8(a)(1). *National Labor Relations Board* v. *Washington Aluminum Co.*, 370 U.S. 9; *National Labor Relations Board* v. *City Yellow Cab Co.*, 344 F.2d 575 (C.A. 6, 1965); *Metal Blast, Inc.* v. *National Labor Relations Board*, 324 F.2d 602 (C.A. 6, 1963); *National Labor Relations Board* v. *Aurora City Lines, Inc.*, 299 F.2d 229 (C.A. 7, 1962).

In addition, the Company had shop rule No. 12 which provided:

> "12. Shop Conduct:
> "Conduct of a nature listed below is not permitted, and if indulged in, is considered cause for suspension or discharge: * * * 18. Soliciting or collecting contributions for any purpose whatsoever on our Company premises without the prior approval of management."

The Board's Order required the Company to cease and

desist from "maintaining any rule prohibiting employees from engaging in Union solicitation on plant premises during non-working time, including break periods."

The Company maintains that even if the employees were discharged for violating Rule 12, Rule 12 is a valid and enforceable rule. This Court, in *Armco Steel Corporation* v. *National Labor Relations Board*, 344 F.2d 621 (C.A. 6, 1965), held that:

> "Whatever right employees had under Section 7 to distribute Union literature on Company property may be waived by their collective bargaining representative. The contractual waiver of rights of equal or greater significance has been upheld."

See also *National Labor Relations Board* v. *Gale Products*, 337 F.2d 390 (C.A. 7, 1964), and *General Motors* v. *National Labor Relations Board*, 345 F.2d 516 (C.A. 6, 1965). Here the Local Union waived its right when the Union advised the Company by letter that it approved the Company rules. The Company's shop rules were not unilateral and were agreed to by the Union. The portion of the Board's Order invalidating this rule will not be enforced.

However, this does not invalidate the unlawful discharges. The Company maintained from the date of discharge until oral argument before this Court that the employees were not discharged because they circulated the petition in violation of shop Rule 12. This issue was raised for the first time during oral argument.

The complaint charged, and the Board found that the three shop stewards were discharged not only for violating the shop rule, but for preparing, signing and circulating the petition, protected activity under Section 7 of the Act. The thrust of the Board's finding was that the Company

wanted to remove the shop stewards who opposed the proposed contract and threatened the Company with a strike. The Board found that the employees were not discharged merely because they solicited on Company premises without the prior approval of management. Consequently, enforcement of that portion of the Board's Order invalidating shop Rule 12 is denied; enforcement of the remainder of the Order is granted.

(CAPTION OMITTED)

ORDER

(Filed July 20, 1967.)

Before: WEICK, Chief Judge, O'SULLIVAN and CELEBREZZE, Circuit Judges.

On petition to enforce an order of the National Labor Relations Board,

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that enforcement of that portion of the Board's order invalidating shop Rule 12 is denied; enforcement of the remainder of the order is granted.

Entered by order of the Court.

/s/ CARL W. REUSS
Clerk

(CAPTION OMITTED)

ORDER

(Filed September 5, 1967.)

Before: WEICK, Chief Judge, O'SULLIVAN and CELEBREZZE, Circuit Judges.

Upon consideration, it is ORDERED that the Respondent's petition for rehearing herein be, and it is hereby denied.

Entered by Order of the Court.

/s/ CARL W. REUSS
Clerk

APPENDIX B

DECISION AND ORDER OF NLRB

On April 14, 1965, Trial Examiner William F. Scharnikow issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision with a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Re-

lations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Order recommended by the Trial Examiner, and orders that the Respondent, The E. W. Buschman Company, Incorporated, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order with the following modifications:[1]

1. Substitute the following paragraph for paragraph 1(a) of the Order:

"(a) Maintaining any rule prohibiting employees from engaging in union solicitation on plant premises during nonworking time, including break periods."

2. Insert the following as paragraph 2(c) of the Order and reletter the subsequent paragraphs accordingly.

"(c) Notify the above-named employees, if presently serving in the Armed Forces of the United States, of their right to full reinstatement upon application, in accordance with the Selective Service Act and the Universal Military

[1] The telephone number for Region 9, appearing at the bottom of the Appendix attached to the Trial Examiner's Decision, is amended to read: Tel. No. 684-3627.

Training and Service Act of 1948, as amended, after discharge from the Armed Forces."

3. Substitute the following paragraph for the first paragraph of the NOTICE TO ALL EMPLOYEES:

> WE WILL NOT prohibit employees from soliciting on plant premises during nonworking time, including break periods, and our no-solicitation rule is rescinded to that extent.

4. Add the following immediately above the double line at the bottom of the NOTICE TO ALL EMPLOYEES:

> NOTE: We will notify the above-named employees, if presently serving in the Armed Services of the United States, of their right to full reinstatement upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

Dated, Washington, D. C., June 28, 1965.

Frank McCulloch, Chairman
John H. Fanning, Member
Gerald A. Brown, Member
National Labor Relations Board

(Seal)

APPENDIX C

The following are the relevant statutes from the National Labor Relations Act, 29 U.S.C. Section 157 (Sec. 7 of the Act), Section 158(a)(1) (Sec. 8(a)(1) of the Act):

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 865

E. W. BUSCHMAN CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 11–16) is reported at 380 F. 2d 255. The Board's decision and order (Pet. App. 17–19) are reported at 153 NLRB 699.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1967 (Pet. App. 16). A petition for rehearing was denied on September 5, 1967 (Pet. App. 17). The petition for a writ of certiorari was filed on November 30, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly concluded that the employer violated the National Labor Relations Act by discharging three employees, who were members of the union bargaining committee, because they had prepared, signed and procured signatures for a petition requesting the union to remove from the bargaining committee another member whom they disfavored.

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act are set forth in the Appendix to the petition (p. 20).

STATEMENT

In July 1963, petitioner Company and the Union [1] engaged in negotiations for the purpose of arriving at a new collective bargaining agreement to succeed the existing one which expired at midnight on July 23, 1963 (J.A. 6a; 76a, 127a).[2] Employees Charles Bole, Herman Clouse, and Bernard Feltner served as Union stewards and members of the Union's bargaining committee (J.A. 6a; 61a, 74a, 127a, 174a). At the bargaining session on the afternoon of July 23, International Union Representative Patrick Williams participated in the negotiations for the first time (J.A. 6a; 76a–77a). At this meeting the Company submitted an offer which, if accepted, would have resulted in a new contract (J.A. 5a; 77a).

[1] Local 522 of the International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO.

[2] "J.A." refers to the portion of the record printed as a joint appendix in the court below.

That evening, at a meeting presided over by Williams, the employees rejected the Company's offer (J.A. 6a; 77a–78a, 127a–128a). A motion was then made by Feltner and seconded by another employee for a "tentative" strike vote (J.A. 7a; 78a, 128a). Williams opposed the motion, and, after a heated discussion, refused to put the strike motion to a vote and abruptly adjourned the meeting (J.A. 7a; 78a–80a, 128a–132a). After the meeting, a group of employees, led by Bole, Feltner, and Clouse, discussed the advisability of excluding Williams from further negotiations (J.A. 7a; 80a–81a, 132a–133a).

The next morning, July 24, Bole brought a petition to work which requested the Union not to permit Williams "to be present at any future meetings on contract negotiations between the E. W. Buschman Co. and Local #522" (J.A. 7a; 82a, 84a, 133a–134a, 358a–359a). Bole arrived at the plant at about 7:30 a.m., one-half hour before the normal starting time (J.A. 7a; 72a, 87a–88a). He took the petition to Clouse's work area, and he, Clouse, and Feltner signed their names to the petition, followed by their titles (J.A. 8a; 85a–86a, 135a, 126a). They remained in the work area and made the petition available for other employees to sign (J.A. 8a; 86a, 135a–137a, 124a–125a, 281a). When the three-minute warning whistle sounded at 7:57 a.m., signaling the beginning of the work day, Bole picked up the petition and locked it inside his desk drawer, where it remained until the lunch hour (J.A. 8a; 86a, 135a–136a). During the morning, Company supervisors reported the circula-

tion of the petition to Plant Superintendent John Graziani and President Rudy Vogt (J.A. 20a–21a; 117a–118a, 276a, 279a–281a, 294a, 220a–221a, 312a–318a).

Shortly before leaving the plant for lunch, Bole removed the petition from his desk and laid it on a desk in Clouse's department, in open view (J.A. 8a; 136a–137a, 168a). While Bole was out for lunch, Graziani came to where the petition was lying, read it, and later took it to his office (J.A. 8a; 168a–169a). Thereafter, Graziani pulled the time cards of the three stewards (J.A. 169a–170a, 175a–176a, 93a, 136a–137a).

The three stewards assembled outside of Graziani's office between noon and 12:30 P.M. (J.A. 7a–9a; 137a–138a, 92a–93a, 175a–176a). Inside, President Vogt, Graziani, Company Attorney Nicholas Bauer, and the stewards' foremen were conferring (J.A. 9a; 93a–95a, 138a–140a, 175a–176a). When the meeting broke up, the foremen told the stewards that they were fired and gave them their final checks (J.A. 9a; 94a, 140a, 176a). The foremen gave no reason for the discharges (J.A. 140a, 176a, 275a, 293a), but, when Clouse pressed the matter, Graziani or one of the other management officials told the stewards that they were being discharged for creating disunity among the employees (J.A. 38a, 9a; 94a–95a, 142a, 176a–177a, 239a). The stewards were also told that they would be advised by letter of the full reasons for their discharge (J.A. 9a; 177a, 95a, 239a, 141a). Graziani then ordered them out of the building and the foremen escorted them to

the front gate of the plant (J.A. 177a–178a, 141a–142a, 95a–96a).

On July 26, the Company mailed letters to the three stewards setting forth the following reasons for their discharge: they had created disunity among employees and failed to remain at their work stations during working hours; Bole and Clouse were insubordinate to supervisors; Clouse failed to do his work properly; and Feltner refused to work overtime and tried to persuade others not to work overtime (J.A. 9a–10a; 71a, 362a–365a).

An unfair labor practice proceeding against the Company ensued. Upon considering the circumstances of the stewards' discharge, the Board, in agreement with the trial examiner, found that the Company discharged Bole, Clouse, and Feltner, not for the reasons later advanced, but because they had prepared, signed, and procured signatures to their petition to change the makeup of the Union bargaining committee (J.A. 46a, 48a; Pet. App. 18); that their activity in this regard was protected by Section 7 of the Act; and that the discharges thus constituted restraint and coercion in violation of Section 8(a)(1) (J.A. 36a, 48a). The Board ordered the Company to offer the discharged employees reinstatement, and to reimburse them for lost wages (J.A. 49a–51a; Pet. App. 18–19).[3]

[3] A shop rule of the Company provides that "[s]oliciting or collecting contributions for any purpose whatsoever on our Company premises without the prior approval of management" shall be "cause for suspension or discharge" (J.A. 361a–362a). In addition to finding a violation based on the discharges

On review, the court of appeals sustained the Board's finding that the three employees were discharged because of their activity in regard to the petition relating to the composition of the Union bargaining committee. Accordingly, it held that the discharges were violative of Section 8(a)(1) of the Act, and enforced the Board order related thereto (Pet. App. 14, 16).

ARGUMENT

The holding of the court below respecting the discharge of the three stewards turns on the facts of this particular case and is clearly correct. There is thus no occasion for further review.

1. The Board found, and the court below agreed, that the three employees were discharged solely because of their role in preparing, signing, and procuring signatures for a petition asking the Union to ex-

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described above, the Board adopted the trial examiner's finding that the maintenance of the shop rule constituted an independent violation of Section 8(a)(1), since the rule, as phrased, was broad enough to prohibit union solicitation during the employees' non-working time (J.A. 12a–13a, 48a; Pet. App. 18). Petitioner admitted that the rule constituted a "technical" violation (J.A. 12a), and filed no exceptions to the examiner's finding respecting this matter. As a remedy for this additional violation, the Board ordered petitioner to cease and desist from maintaining a rule barring union solicitation during nonworking time (Pet. App. 18; J.A. 48a).

However, the court declined to enforce that part of the Board order which prohibited the maintenance of the Company's no-solicitation rule (see note 3, *supra*). The court found that the Union had consented to the issuance of the rule by letter (J.A. 244a), and had thus waived the right to solicit during non-working time which it might otherwise have had (Pet. App. 15).

clude International Representative Williams from the Union bargaining committee. By engaging in this activity, the three employees were attempting "to assure themselves and their like-minded fellow employees of a bargaining committee responsive to their desires * * *" (J.A. 36). It is well settled that "[a]ttempts by some members of a union to bring about a change in the union's attitude about * * * collective bargaining [constitutes] 'concerted activity' protected by Section 8(a)(1) of the Act." *National Labor Relations Board* v. *Nu-Car Carriers, Inc.*, 189 F. 2d 756, 760 (C.A. 3), certiorari denied, 342 U.S. 919. See also *National Labor Relations Board* v. *Aurora City Lines, Inc.*, 299 F. 2d 229, 231–232 (C.A. 7); *Salt River Valley Association* v. *National Labor Relations Board*, 206 F. 2d 325, 328 (C.A. 9).

2. Petitioner does not challenge the Board's finding that it discharged the three employees because of their activity in connection with the petition to change the composition of the Union bargaining committee; nor does it deny that the preparation and circulation of such a petition is, as a general matter, activity protected by Section 7 of the Act. It contends, however, that the Union, by accepting the Company's shop rule barring union solicitation in the plant during nonworking time, waived the employees' Section 7 right to circulate the petition (Pet. 6–7).

There is no merit, we submit, to petitioner's belated[6] contention. Even if the court below correctly

[6] In its brief to the trial examiner (p. 2), petitioner asserted that "there is absolutely no relation between [the shop] rule and the discharge of the three employees * * *." Moreover,

concluded that the Union acquiesced in the shop rule and that this acquiescence amounted to a waiver of the employees' Section 7 right to engage in union solicitation in the plant during non-working time,[6] the employees "were not discharged merely because they solicited on Company premises without the prior approval of management" (Pet. App. 16) in violation of the shop rule. Rather, they were discharged because the Company disfavored their attempt to remove International Representative Williams from the Union bargaining committee.[7] Whatever waiver flows from the Union's acquiescence in the no-solicitation rule, that rule certainly cannot be construed as empowering the Company to discipline employees merely for pursuing such an objective.

3. Finally, petitioner is mistaken in asserting that the court of appeals acted inconsistently in finding the no-solicitation rule binding on the Union and yet concluding that a violation of Section 7 rights was

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petitioner conceded that the shop rule might constitute a "technical violation of 8(a)(1) of the Act" (J.A. 12a), and filed no exceptions with the Board respecting the examiner's finding that the rule was in fact unlawful.

[6] However, it is settled that a waiver of statutory rights must be clear and unmistakeable. See *National Labor Relations Board* v. *Perkins Machine Co.*, 326 F. 2d 488, 489 (C.A. 1). That was hardly the case here (see note 3, *supra*).

[7] As the court below stated, "There was substantial evidence that the Company * * * knew that the three stewards were the motivating force for rejecting the Company's offer and excluding Williams" (Pet. App. 14), and "[t]he thrust of the Board's finding was that the Company wanted to remove the shop stewards who opposed the proposed contract and threatened the Company with a strike" (Pet. App. 15–16).

volved. Contrary to petitioner's contention (Pet. 6–10), the inapplicability or invalidity of the shop rule was not a necessary predicate to the Board's finding that the discharges were unlawful. Thus, petitioner was in no sense found to have violated Section 7 rights not protected by the Act; nor did the court below fail to give effect to the shop rule.[8]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1967.

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[8] Since the discharges were not predicated on violation of the shop rule, the court below correctly concluded that there is no conflict between its decision here and the cases where employees have been discharged for engaging in union activity in violation of provisions in collective bargaining agreements barring such activity (see Pet. App. 15). Accordingly, the cases relied upon by petitioner as presenting a conflict (Pet. 4–6) are plainly distinguishable.

U.S. GOVERNMENT PRINTING OFFICE: 1968

SUPREME COURT, U. S.

No. 865

In The

Supreme Court of the United States

October Term, 1967

E. W. BUSCHMAN CO.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION

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COURT BRIEF PRESS, INC. — Law Printers, [illegible]

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REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION

REPLY BRIEF OF PETITIONER

Stripped to its essentials, our argument is this. The NLRB assumed the law to be that our company rule prohibiting any solicitation on company premises was invalid, even though it was agreed to by the union. The Board found that the company's motivation for the discharge of the employees was the circulation of the petition on company premises.[1] The Board then concluded there was a violation

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[1] The Trial Examiner, whose findings were adopted by the Board, found that *"the real reason for the respondent's discharging the three stewards* was their known participation in the preparation and presentation of the ouster petition to the other employees." (Joint Appendix, page 43a, emphasis added)

of 8 (a) (1), because such a motivation for discharge led to an interference with Section 7 rights. The Sixth Circuit, however, held that the no-solicitation rule was valid because of the union approval. It further held that the existence of that rule constituted a *waiver* of any Section 7 right to circulate petitions on company premises. Even though the rule expressly provided that violations of it were grounds for discharge (and there is no question that these employees acted in violation of the rule), the Sixth Circuit affirmed the Board and held the company had interfered with Section 7 rights. We argue that this is inconsistent and illogical.

The response of the Board's brief is to ignore our argument and to be ambivalent. At times, the brief asserts that the discharges were unrelated to the shop rule. ("(T)he discharges were not predicated on violation (sic) of the shop rule . . ."—p. 9, fn. 8) Any assertion that the discharges were unrelated to the employees' violation of the shop rule conflicts with the Sixth Circuit's interpretation of the Board's finding. The Sixth Circuit concluded that the Board found as one of the motivations for discharging these employees their violation of the shop rule. Said the Sixth Circuit in its opinion (Pet. App. 15):

> "The complaint charged and the Board found that the three shop stewards were discharged not only for violating the shop rule, but for preparing, signing and circulating the petition, protected activity under Section 7 of the Act."[2]

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[2] The internal inconsistency of the Sixth Circuit's decision in this case is well illustrated by the above quote. That quote indicates that the Sixth Circuit concluded there were two motivations for discharge (1) violation of the shop rule and (2) preparing and circulating the petition, with the latter being a protected activity under Section 7 of the act. The problem is that the existence of the shop rule, according to an earlier part of the decision, *waived* the Section 7 rights to circulate the petition. Therefore, the second motivation of circulating the petition is not a "protected activity under Section 7 of the Act." The next two sentences of the Sixth Circuit's opinion reads:

At other times, the Board's brief acknowledges that one of the two motivations for the discharge was a violation of the shop rule, but the company's other motivation, states the brief, was to interfere with the three employees' attempt to remove the International representative from the bargaining committee (p. 8). Because of the dual motivation says the Board, whether the shop rule is valid or invalid is therefore irrelevant.[3]

This is too facile. If the motivation for discharge in part is the violation of a valid shop rule, then the following questions are some that are raised which were never considered by the Board (or the Sixth Circuit):

1. The shop rule expressly provided that a violation was cause for discharge. Section 10 (c) of the Act prohibits reinstatement of an employee "discharged for cause." If the shop rule was invalid, 10 (c) is irrelevant. Because it is valid, 10 (c) is relevant. Therefore, would the Board change its result?[4]

"The thrust of the Board's finding was that the company wanted to remove the shop stewards who opposed the proposed contract and threatened the company with a strike. The Board found that the employees were not discharged merely because they solicited on company premises without the prior approval of management."

But this creates a whole series of new problems and questions. See discussion below.

[3] The brief states (p. 9) that the "invalidity of the shop rule is not a necessary predicate to the Board's finding that the discharges were unlawful." As the argument below shows it cannot be ascertained whether the invalidity of the shop rule is "a necessary predicate," because the rule's invalidity raises critical questions never considered by the Board.

[4] For instance, see *NLRB* v *Local 1229, IBEW*, 346 U.S. 464 (1953) where the discharge of striking employees who circulated handbills attacking the quality of the employer's product was held to be a discharge for cause under Section 10 (c). This Court cited the language of the Congressional Conference Report that the discharge for cause provisions of Section 10 (c) applied "whether or not the acts constituting the cause for discharges were committed in connection with a concerted activity."

2. The fact that discharged employees are involved in union related pursuits does not mean that they can engage in any and all conduct. Section 7 does not protect conduct that is unlawful,[5] violent,[6] a breach of contract,[7] or disloyal.[8] The conduct of these men — because of the validity of the shop rule — was (1) unprotected by Section 7 and (2) a breach of the contract.[9] The heart of the Board's decision is the finding of the trial examiner that the *real reason* for the discharge was "the preparation and presentation of the ouster petition to the other employees." Because that petition activity was unprotected activity, does that mean that the company is totally exonerated?

3. What if the company had failed to punish these dissident employees for circulating the petition at such a critical juncture? A failure to invoke a valid shop rule might mean that the company was discriminating *against* the union, the international, and its adherents, by allowing these dissidents to undercut them with a petition, meaning a violation of 8 (a) (3). Would this make any difference?

The answers to the above questions may or may not change the result. What is certain is that the Board should decide the effect on its result of a valid shop rule. This Court many times has required a clarification of the opinions, reasons and findings of an administrative agency before it will pass on the validity of the agency's conclusion. *Schaffer Transport Company* v. *U. S.*, 355 U.S. 83 (1957);

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[5] *Southern Steamship Co.* v. *NLRB*, 316 U.S. 31.

[6] *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240.

[7] *NLRB* v. *Sands Mfg. Co.*, 306 U.S. 332.

[8] *NLRB* v. *Local 1229, IBEW, supra.*

[9] The shop rule was enacted in pursuance to a power given to the company under the collective bargaining agreement and then was approved, upon issuance, by the union.

Secretary of Agriculture v. *U. S.*, 347 U.S. 645 (1954). Perhaps it is preferable for this Court to answer them.

The disagreement between the Board and the Sixth Circuit as to the validity of the shop rule, coupled with the conclusion that a violation of the rule played a role in the discharge, requires this court to grant our petition.

CONCLUSION

At the least, this Court should take this case in to resolve the conflict between the Board on one hand and the Sixth and Seventh Circuits, on the other, as to the validity of a company no-solicitation rule agreed to by the union. If this Court upholds the validity of the shop rule, which partially motivated the discharges, then this Court could consider, or remand to the Board or Sixth Circuit to consider, the impact of such on the order to reinstate. The Petition should be granted.

Respectfully submitted,

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GELDEHORN

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SUPREME COURT, U. S.

FEB 5 1968

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No. 866

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1967

E. W. BUSCHMAN CO.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In The

Supreme Court of the United States

October Term, 1967

No. 865

E. W. BUSCHMAN CO.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

E. W. Buschman Co., Petitioner, prays that this court grant a rehearing of its order of January 15, 1968 denying the petition for a writ of certiorari and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit in the above entitled case as prayed for in the petition filed November 30, 1967 herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. Petitioner alleged in its petition that certiorari should be granted for the writ on several grounds. Upon further consideration and research petitioner has additional substantial grounds, which were not previously presented, for the issuance of the writ of certiorari. One additional

ground is that the Sixth Circuit has rendered in this case a decision in conflict with the decision of two other courts of appeal on the same matter. Two courts of appeal have held that a broad rule prohibiting solicitation on company premises during non-working time and in non-working areas is valid if approved in a collective bargaining agreement with a union.[1] Admittedly the Sixth Circuit in the present case said that such a rule approved by the union was valid, but it refused to grant any efficacy to that rule. This arises from the fact that the rule expressly provided that a violation thereof was grounds for discharge. The court concluded that the three employees were discharged for violating the shop rule, *inter alia*, but still ordered reinstatement. As a result, *the effect* of the Sixth Circuit decision is that such a no-solicitation rule is invalid because it is unenforceable. This conflicts with *the effect* of the Seventh Circuit and the Ninth circuit decisions which have held that such a rule is enforceable in the cases cited in footnote 1. Thus, although on the surface there is no conflict between the Sixth Circuit on the one hand, and the Seventh and Ninth on the other, *the effect* of the Sixth Circuit's decision in our case is to put it "in conflict with the decision of another court of appeals on the same matter . . ." (Rule 19 (1) (b) of the Rules of this Court.)

2. In addition to the above conflict *in effect* between the courts of appeal, the other substantial ground not previously presented is that there is a potentiality of a directly conflicting ruling coming from another court of appeals. In *Mid-States Metal Products, Inc., et al.*, 156

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[1] *NLRB* v. *Gale Products*, 337 F.2d 390 (CA 7, 1964); *NLRB* v. *General Motors*, (CA 9) No. 21,031, an unreported per curiam order of January 12, 1967 denying enforcement of the Board's order in *General Motors Co.*, 158 NLRB 1723. Note this Ninth Circuit disposition was not discovered by petitioner when the prior petition and reply brief were submitted by petitioner.

NLRB, No. 90 (January 17, 1966), among other issues, there was involved a broad no-solicitation rule incorporated into a collective bargaining agreement. This rule was invoked by the company to discharge an employee who was circulating an anti-union petition. The Board held that the rule could not be invoked to discharge an employee under such circumstances and required reinstatement. The Board sought enforcement of its decision and order in the Fifth Circuit in the case of *NLRB* v. *Mid-States Metal Products, Inc.*, No. 23352. That case was argued on April 12, 1967 and no decision has been issued yet.[2] If the Fifth Circuit reverses the Board (in conformance with the Seventh and Ninth Circuit positions) and holds that such a rule can be the basis for the discharge of an employee, it would be in conflict with the Sixth Circuit ruling in this case. This Court has in the past taken in cases on writs of certiorari where there is the potentiality of conflict between the courts of appeals.[3] At the least, this Court should delay acting on this petition for a rehearing until the Fifth Circuit issues a decision in *Mid-States Metal Products, supra.*

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[2] The posture of this case before the Fifth Circuit was unknown to petitioner when the petition for a writ of certiorari and reply brief were filed.

[3] See Stern & Gressman, *Supreme Court Practice*, 3rd Edition, Pages 131-2:

> "Where the district court decision is pending on appeal to another court of appeals, and the petitioner seeking review of the court of appeals decision cannot delay his petition for certiorari until the other appeal has been decided, the Supreme Court has occasionally granted the Petition. See *Gulf States Steel Co.* v. *United States*, 287 U.S. 32. In that circumstance, the Court may consider that the possibility of the other appeal resulting in an affirmance and therefore in conflict between the courts of appeals is enough to warrant review. Otherwise the petitioner would be unable to secure review, because of the time element, should the other appeal result in a direct conflict on the appellate level."

In view of the importance of the no-solicitation rule, it is respectfully submitted that the validity and effect of such a rule, when approved by the union, should be determined by this Court and the conflicts resolved thereby.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari and the reply brief of petitioner, it is respectfully urged that (1) a rehearing be granted and that upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Sixth Circuit or (2) in the alternative, this Court await the Fifth Circuit's decision in *Mid-States Metal Products* because of the potentiality of a conflict among the circuits.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for a rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

.....
Attorney for Petitioner